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No. 90-1249

In The Supreme Court Of The United States

OCTOBER TERM, 1990

R.R. DONNELLEY & SONS COMPANY,
Petitioner,

v.

JUDY PREVOST, GERALD KOLINSKY, Compensation Commissioner, Eighth District, State of Connecticut; JOHN A. ARCUDI, Chairman, Board of Compensation Commissioners, State of Connecticut; RICHARD BLUMENTHAL, Attorney General, State of Connecticut,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents

Gerald Kolinsky, John A. Arcudi, Richard Blumenthal:

RICHARD BLUMENTHAL
ATTORNEY GENERAL OF THE
STATE OF CONNECTICUT
ARNOLD B. FEIGIN*
Assistant Attorney General
P.O. Box 120
55 Elm Street
Hartford, Connecticut 06101
Telephone: (203) 566-4990

Judy Prevost:

BIANCA D. MACKEY, ESQ.
ASHCRAFT & GEREL
60 Washington Street
Suite 1202
Hartford, CT 06106
Telephone: (203) 249-8520

*Counsel of Record

QUESTION PRESENTED

Whether, under *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), § 4(b)(3) of ERISA saves from ERISA preemption Connecticut General Statutes § 31-284b.

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STATEMENT OF THE CASE

The Statute

The respondents disagree with the petitioner's characterization of § 31-284b of the Connecticut General Statutes at issue in this case. By its terms, the statute applies to all employers providing life, health, and accident benefits to active employees, whether or not the employer's plan is covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* Conn. Gen. Stat. § 31-275(6), Respondents' Appendix ("R. App.") A1; Conn.

Gen. Stat. § 31-284b, Petitioner's Appendix ("Pet. App.") A59-60. Similarly, the employer's obligation under § 31-284b is measured by the employee's level of "income" from all sources prior to injury, including life, health, and accident insurance benefits, whether or not these benefits were provided by ERISA-covered plans. Conn. Gen. Stat. § 31-275(14), R. App. A2.

The respondents also disagree with the petitioner's characterizations of § 31-284b and its statutory predecessor, Connecticut General Statutes § 31-51h. Pet. App. A56-57. The petitioner states that § 31-51h prohibited employers from discontinuing benefits to employees eligible to receive workers' compensation, and that § 31-284b continues this prohibition with the nominal option of providing equivalent benefits under separately administered plans. Petition, p. 4. The respondents respectfully note that the petitioner's emphasis on the perceived similarities between the two plans is misplaced, and that, of the five options provided by § 31-284b for the provision of continued or equivalent benefits to injured employees, four options contemplate the creation of separately administered plans exempt from ERISA's scope.

The Role of the Parties

The petitioner, R. R. Donnelley & Sons Company ("Donnelley") voluntarily provides life insurance and health and dental benefits to its employees through employee welfare benefit plans covered by ERISA. Pet. App. A33-34. At some time after May, 1983, the respondent Judy Prevost, a Donnelley employee in Connecticut, suffered work-related injuries. Pet. App. A36. These injuries necessitated Prevost's absence from work from May 1, 1986 to May 25, 1988, except during the period from February 9, 1987 to February 27, 1987, when she temporarily returned to work. Pet. App. A36. Prevost has remained eligible to receive and has received workers' compensation payments since December 5, 1985. Pet. App. A48.

From May 1, 1986 to May 25, 1988, during Prevost's absence from work, Donnelley maintained Prevost in active status and continued to provide her with life insurance and health and dental benefits in accordance with its employment policies and employee welfare benefit plans. Pet. App. A36. Donnelley terminated Prevost's dental benefits on May 25, 1988, health benefits on June 25, 1988, and life insurance coverage on June 26, 1988. Pet. App. A37. Prevost was advised of her right to continue these coverages at her own expense. Pet. App. A37.

By letter dated May 19, 1988, Respondent State Compensation Commissioner Gerald Kolinsky reminded Donnelley of its obligation under Connecticut General Statutes § 31-284b to continue to provide accident, health, and life insurance benefits to Prevost while she remained eligible to receive workers' compensation benefits. Pet. App. A37-38, R. App. A3. This action followed.

Course of the Proceedings

Donnelley brought suit in the United States District Court for the District of Connecticut seeking injunctive relief and a declaration that § 31-284b was preempted by § 514(a) of ERISA, 29 U.S.C. § 1144(a). Pet. App. A44-50. The parties filed cross motions for summary judgment on this issue.

On April 12, 1989, the District Court rendered summary judgment for the respondents, ruling that although § 31-284b relates to employee benefit plans covered by ERISA, § 31-284b is exempt from preemption under § 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), under this Court's ruling in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Pet. App. A18-27. The Court of Appeals for the Second Circuit affirmed the opinion and judgment of the District Court on September 24, 1990, Pet. App. A1-17, and denied the petitioner's motion for rehearing and suggestion for rehearing in banc on November 1, 1990, Pet. App. A32.

SUMMARY OF ARGUMENT

The petitioner misstates the scope of Connecticut General Statutes § 31-284b, a workers' compensation statute which requires employers providing accident, health, and life insurance coverage, or welfare fund payments, to active employees, to continue such benefits, or their equivalent, for employees entitled to workers' compensation. Section 31-284b applies to all employers, including employers whose benefit plans are exempt from ERISA coverage in the first instance under §§ 4(b)(1) and (2) of ERISA. Contrary to the petitioner's assertion, § 31-284b is not directed solely to ERISA plan sponsors or to ERISA-covered plans.

The Second Circuit opinion is consistent with the decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), and does not conflict with applicable decisions of this Court. The statute requires employer compliance in an area of law expressly reserved to the states by Congress in § 4(b)(3) of ERISA. Unlike its statutory predecessor, Connecticut General Statutes § 31-51h, § 31-284b provides optional methods of employer compliance with its requirements. It does not require compliance through ERISA-covered plans.

The Second Circuit correctly applied the two-tier analysis employed by this Court in *Shaw, supra*, in determining whether § 31-284b was preempted by ERISA § 514(a), 29 U.S.C. § 1144(a). Under *Shaw*, a finding that a state law "relates to" ERISA-covered plans is not dispositive and serves only to prompt the further inquiry whether any exception in ERISA saves the statute from preemption. Neither the nature of the impermissible relation to ERISA-covered plans nor the type or level of employee benefits contemplated by the state law operates to preclude this further inquiry.

Congress never intended uniformity in the areas of law specifically reserved to the states under ERISA § 4(b)(3), nor did Congress intend, at the same time that it preserved the

role of the states, to make enforcement of state laws in those areas impossible. Section 31-284b does no more than the statute found by this Court to be excepted from preemption in *Shaw, supra.* The Second Circuit decision does not undermine ERISA's goal of national uniformity in the regulation of employee benefit plans.

ARGUMENT

I. THE DECISION OF THE SECOND CIRCUIT DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the Second Circuit below, Pet. App. A1-17, that Connecticut General Statutes § 31-284b is excepted from preemption under§ 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), does not conflict with applicable decisions of this Court and is wholly consistent with the decision in *Shaw, supra.* Section 4(b)(3) exempts from ERISA coverage those employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. 1003(b)(3), Pet. App. A52.

That § 31-284b is a workmen's compensation law is beyond question. The stated purpose of the statute is "to maintain, as nearly as possible, the income of employees who suffer employment-related injuries . . . ." Conn. Gen. Stat. § 31-284b, Pet. App. A59. "Income" is defined in the Connecticut Workers' Compensation Act as "all forms of remuneration to an individual from his employment, including wages, accident and health insurance coverage, life insurance coverage and employee welfare fund contributions." Conn. Gen. Stat. § 31-275(14), R. App. A2. As the District Court correctly noted:

> . . . the statute does not intrude upon the initial decision to provide such benefits but rather requires the continuation of benefits equivalent to those provided incident to employment, as a form of compensation to employees who suffer employment related injuries. It would preserve the level of compensation of an employee injured in his employment during the period of compensated disability.

Pet. App. A25.

Section 31-284b requires *"any employer, as defined in section 31-275,* who provides accident and health insurance or life insurance coverage for any employee or makes payments or contributions . . . to an employee welfare fund . . . [to] provide such employee equivalent insurance coverage or welfare fund payments or contributions while the employee is eligible to receive or is receiving workers' compensation payments . . . ." Conn. Gen. Stat. § 31-284b (emphasis supplied), Pet. App. A59. "Employer" is defined in § 31-275(6) of the Workers' Compensation Act as including the state and any public corporation within the state. Conn. Gen. Stat. § 31-275(6), R. App. A1.

The petitioner repeatedly asserts to this Court that § 31-284b applies only to employers who sponsor ERISA-covered plans. By its terms, however, § 31-284b applies to all employers who provide accident, health, and life insurance benefits, whether or not the employer's plan is covered by ERISA. Governmental and church employee benefit plans are not covered by ERISA under § 4(b)(1) and (2) of ERISA, 29 U.S.C. § 1003(b)(1), (2). Governmental and church employers, however, are subject to § 31-284b. The petitioner acknowledged before the Second Circuit that, "[t]here are, however, two categories of plans providing health and life insurance benefits to employees generally that *fall within Section 31-284b but are exempted from ERISA coverage* -- namely governmental and church plans. ERISA § 4(b)(1), (2), 29 U.S.C. § 1003(b)(1), (2)." (Brief of Appellant R. R. Donnelley

& Sons Company at Second Circuit, p. 15, n. 12) (emphasis supplied). The petitioner's current claim suffers from overreaching.

Subsection (b) of § 31-284b provides four options by which an employer can meet its statutory obligation to continue benefits: (1) by purchasing insurance; (2) by "creating an injured employee's plan as an extension of any existing plan for working employees"; (3) by self-insuring; or (4) by combining as many of the above-mentioned methods as the employer may choose. Conn. Gen. Stat. § 31-284b(b), Pet. App. A59. Subsection (c) of § 31-284b permits, but does not require, the additional option of continuing payments or contributions to an employee welfare fund, where the terms and conditions of the fund permit. Conn. Gen. Stat. § 31-284b(c), Pet. App. A59.

The four optional methods of employer compliance provided in subsection (b) of § 31-284b clearly contemplate the creation of separately administered plans maintained solely to comply with the requirements of a state workers' compensation law. An additional option, of continuing contributions to an existing welfare fund where the terms and conditions of the fund permit, is provided in subsection (c). As the Second Circuit and District Court below ruled, that additional option was expressly endorsed under ERISA § 4(b)(3) by this Court in *Shaw, supra.* Pet. App. A13; Pet. App. A27.

In *Shaw, supra,* the Court confronted the question whether § 514(a) of ERISA, 29 U.S.C. § 1144(a), preempted a New York Disability Benefits Law that required employers to pay sick leave benefits to employees unable to work because of pregnancy or other nonoccupational disabilities. Section 514(a) preempts state laws which "relate to employee benefit plans described in section 1003(a) [of ERISA] and not exempt under section 1003(b) . . . ." 29 U.S.C. § 1144(a), Pet. App. A54. The Court held that, although the Disability Benefits Law clearly "relate[d] to" ERISA-covered employee benefit plans under § 514(a) because it required employers to pay

specific benefits, the statute, nevertheless, was not preempted by ERISA. *Shaw*, 463 U.S. at 97, 109. Addressing the possibility that employers might attempt to circumvent state laws by adopting employee benefit plans that combine disability benefits inferior to those required by state law with other benefits, the Court said:

> . . . while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan. If the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply. The Court of Appeals erred, therefore, in holding that appellants are not at all free to enforce the Disability Benefits Law against those appellees that provide disability benefits as part of multibenefit plans.

Shaw, 463 U.S. at 108.

Donnelley argues that "only by significantly misreading *Shaw*" could the Second Circuit have concluded that § 31-284b is not preempted by ERISA. Petition, p. 12. The respondents take issue with the petitioner's attempt to recast as "dictum" the guiding principle of this Court's holding in *Shaw*, upon which both the Second Circuit and the District Court relied. In *Shaw*, this Court said:

> A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit. Such a plan would be exempt under § 4(b)(3). The fact that state law permits employers to meet their state-law obligations by including disability insurance benefits in a multibenefit ERISA plan [citation omitted] does not

make the state law wholly unenforceable as to employers who choose that option.

Shaw, 463 U.S. at 108. The Second Circuit, presented with the statutory scheme contemplated and approved in *Shaw*, *supra*, correctly concluded that § 31-284b is not preempted by ERISA.

The petitioner mistakenly relies on the Second Circuit's observation that ". . . section 31-284b has precisely the same impact upon private employee benefit plans that we discerned former section 31-51h to have in *Stone*." Petition, p. 6, Pet. App. A9. Section 31-51h was fatally flawed, not because it imposed an additional statutory requirement on employers, but because it required employers to alter the terms and conditions of ERISA plans in order to comply with its terms. In analyzing § 31-284b in the context of the decision in *Shaw*, the Second Circuit correctly recognized the critical distinction between requiring employer compliance with state laws in areas expressly reserved to the states under § 4(b)(3) of ERISA, which is permissible, and requiring compliance in those areas through ERISA-covered plans, which is not permissible. In other words, under § 31-284b, any effect of the statute on private employee benefit plans is at the option of the employer.

Under *Shaw*, the choice of the means of compliance with state workers' compensation, disability insurance, and unemployment compensation laws is left to the employer; the choice of compliance or noncompliance with these laws is not. The rationale of *Shaw* was the removal of the terms and conditions of ERISA plans as barriers to the enforcement of state laws in areas expressly reserved to the states under § 4(b)(3) of ERISA. *Shaw*, 463 U.S. at 108. The effect of the decision was the validation of state efforts to require employer compliance in these areas.

II. NEITHER AN IMPERMISSIBLE RELATION BETWEEN A STATE LAW AND ERISA PLANS NOR THE NATURE OR LEVEL OF THE MANDATED BENEFITS DETERMINES PREEMPTION BY ERISA.

The petitioner argues that the finding that § 31-284b "relates to" ERISA-covered plans under § 514(a) of ERISA, should have been dispositive of the Second Circuit's inquiry into preemption. In the petitioner's view, the Second Circuit erroneously undertook to determine whether § 31-284b was saved from preemption under § 4(b)(3) of ERISA and, in the process, significantly departed from controlling precedent of this Court.

The two-tier analysis of the Second Circuit was wholly consistent with the analytical approach employed by this Court in *Shaw, supra.* This Court said in *Shaw,* "[t]he issues are whether the Human Rights Law and Disability Benefits Law 'relate to' employee benefit plans within the meaning of § 514(a), . . . *and, if so, whether any exception in ERISA saves them from pre-emption.*" *Shaw,* 463 U.S. at 96 (emphasis supplied). Accordingly, the Second Circuit correctly understood that the finding of an impermissible relation under § 514(a) of ERISA served only to trigger the second step of the *Shaw* analysis, not to preclude further inquiry.

The petitioner relies on *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981), *Ingersoll-Rand Co. v. McClendon,* ____ U.S. ____, 111 S. Ct. 478 (1990), and *Mackey v. Lanier,* 486 U.S. 825 (1988), for the proposition that the scope of the preemption inquiry is limited by a finding that a state law "relates to" ERISA-covered plans under § 514(a). The petitioner's argument attempts to prove too much, in that none of the cited cases involved a state law which contemplated compliance through separately administered plans. The opportunity to employ the two-tier analysis of *Shaw,* therefore, was not presented.

The petitioner further argues that the type and level of the mandated benefits can be determinative of an impermissible relation and, therefore, of preemption under § 514(a) of ERISA. The petitioner attempts to distinguish the Disability Benefits Law at issue in *Shaw, supra,* from § 31-284b by arguing that the disability benefit in *Shaw* was measured by the employee's weekly wage, not itself an ERISA-covered benefit, whereas both the nature and the level of the benefits mandated by § 31-284b refer to benefits customarily provided by employee welfare plans. By arguing that the Disability Benefit Law "made no reference to ERISA-covered plans," Petition, p. 13, the petitioner appears to be arguing that the law did not "relate to" ERISA plans within the meaning of § 514(a) of ERISA. This argument overlooks both the clear finding to the contrary in *Shaw,* 463 U.S. at 97, and the obvious nature of the disability benefit mandated by the New York statute. Neither the nature nor the level of the mandated benefits, therefore, is relevant to the question of preemption under the *Shaw* analysis.

III. CONGRESS DID NOT INTEND UNIFORMITY IN THOSE AREAS OF LAW EXPRESSLY RESERVED TO THE STATES UNDER § 4(b)(3) OF ERISA.

The petitioner argues that the decision of the Second Circuit, that § 31-284b is not preempted by ERISA, will undermine the national uniformity of laws applicable to ERISA-covered plans and will permit states to impose inconsistent burdens on employers. The petitioner suggests that states will resurrect and recodify as workers' compensation, disability insurance, or unemployment compensation laws, statutes previously preempted by ERISA and dependent upon benefits provided by ERISA-covered plans. As previously argued, however, the petitioner has mischaracterized § 31-284b.

The scenario posed by the petitioner is illusory, both in law and in fact. The goal of national uniformity was never intended by Congress to apply to laws in the areas of workers' compensation, disability insurance, or unemployment compensation. Congress, by explicitly reserving these areas to the states in § 4(b)(3) of ERISA, recognized that state laws in these areas would differ. This Court stated in *Shaw, supra,* that, "Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible." *Shaw,* 463 U.S. at 108.

The District Court observed that, "[s]ection 31-284b does no more than the statute found to be exempt from preemption in *Shaw.*" Pet. App. A27. Accordingly, the Second Circuit decision sets no precedent and does not threaten ERISA's goal of national uniformity.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this matter should be denied.

Respectfully submitted,

RESPONDENTS
Gerald Kolinsky, John A. Arcudi, Richard Blumenthal:

RICHARD BLUMENTHAL
ATTORNEY GENERAL

ARNOLD B. FEIGIN
Assistant Attorney General
Counsel of Record
P.O. Box 120
55 Elm Street
Hartford, Connecticut 06101
Telephone: (203) 566-4990

RESPONDENT
Judy Prevost:

BIANCA D. MACKEY, ESQ.
ASHCRAFT & GEREL
60 Washington Street
Suite 1202
Hartford, Connecticut 06106
Telephone: (203) 249-8520

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RESPONDENTS' APPENDIX

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Sec. 31-275. Definitions. Terms in this chapter are defined as follows:

(6) "Employer" means any person, corporation, firm, partnership, voluntary association, joint stock association, the state and any public corporation within the state using the services of one or more employees for pay, or the legal representative of any such employer, but all contracts of employment between an employer employing persons excluded from the definition of employee and any such employee shall be conclusively presumed to include the following mutual agreements between employer and employee: (A) That the employer may accept the provisions of this chapter and become bound thereby by forthwith complying with section 31-284; (B) that, if the employer so accepts the provisions of this chapter, the employee shall thereupon be deemed to accept such provisions and shall be bound thereby, unless the employer neglects or refuses to furnish forthwith to the employee, on his written request, evidence of compliance with section 31-284, in the form of a certificate from the compensation commissioner, the insurance commissioner or the insurer, as the case may be; (C) that the employee may, at any time, withdraw his acceptance of such provisions and become released therefrom by giving written or printed notice of such withdrawal to the commissioner having jurisdiction and also to the employer, and such withdrawal shall take effect forthwith from the time of its service on the commissioner and the employer; and (D) that the employer may withdraw his acceptance and the acceptance of the employee by filing a written or printed notice of his withdrawal with such commissioner and with such employee, which withdrawal shall become effective forthwith from the time of its service on the commissioner and the employee. The notices of acceptance and withdrawal to be given by an employer employing persons excluded from the definition of employee and the notice of withdrawal to be given by the employee, as herein provided, shall be served upon such commissioner, employer or employee, either by personal presentation or by registered or certified mail. In determining the number of employees

employed by an individual, the employees of a partnership of which he is a member shall not be included. A person who is the sole proprietor of a business or who is a partner in a business may accept the provisions of this chapter by notifying the workers' compensation commissioner having jurisdiction, in writing, of his intent to do so. If such person accepts the provisions of this chapter he shall be considered to be an employer and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284. Such person may withdraw his acceptance by giving notice of his withdrawal, in writing, to such commissioner.

Sec. 31-275. Definitions. Terms in this chapter are defined as follows:

(14) "Income" means all forms of remuneration to an individual from his employment, including wages, accident and health insurance coverage, life insurance coverage and employee welfare plan contributions.

GERALD KOLINSKY
Compensation Commissioner
Eighth District

62 Washington Street
Middletown, Connecticut 06457
TEL. 344-7453

State of Connecticut
WORKERS' COMPENSATION COMMISSION

May 19, 1988

Mr. Bernard F. Johnson
Personnel Coordinator
R.R. Donnelley & Sons Co.
Schoolhouse Road
Old Saybrook, CT 06475

Re: Judy Prevost vs. R.R. Donnelley & Sons
DI: 11/28/85

Dear Mr. Johnson:

Enclosed please find a photocopy of your letter to Ms. Prevost, dated May 2, 1988, which she dropped off here yesterday.

I have placed an asterisk next to your fifth paragraph, and wish to remind you that Section 31-284b, of the Workers' Compensation Act requires an employer to continue to provide to an injured employee continuing coverage for group accident and health insurance or life insurance coverage while the employee is eligible to receive or is receiving workers' compensation payments. The statute permits the employer to provide equivalent coverage.

To the best of my knowledge, Ms. Prevost is eligible for ongoing benefits, and if you convert her policy (group life), you may be required to pay the premiums as long as she is receiving compensation benefits. The same would be true of her medical insurance.

A copy of Section 31-284b is enclosed for your reference.

Very truly yours,

/s/ Gerald Kolinsky
Gerald Kolinsky
Compensation Commissioner
Eighth District

GK:cs
cc: Gallagher Bassett Services, Inc.
Ms. Judy Prevost
Enc.